Supreme Court U.S.
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No.

In The Supreme Court Of The United States

KRISTANTI SANUSI, et al.,

Petitioners

v.

ALBERTO GONZALES, Attorney General,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

8 C.F.R. §208.16(b) permits an applicant to demonstrate eligibility for *mandatory* withholding of removal if the applicant establishes that the applicant has been "singled out" for persecution *or* that there is a "pattern or practice" of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group or political opinion *and* by establishing the applicant's own "inclusion in and identification with such group of persons" such that it is more likely than not that his or her life or freedom would be threatened.

This petition presents the question—on which there is a well established circuit split—of whether an applicant for withholding of removal who has demonstrated membership in a "disfavored group" (as this term was first described by the Ninth Circuit and explicitly embraced by the Fourth and Eight circuits) must still be required to show that she has been "singled out individually" for persecution to establish that "it is more likely than not that her life or freedom would be threatened".

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kristanty Sanusi, her husband DJoni Susanto Lie and their minor son Stephen Susanto, respectfully petition for a writ of certiorari to review the judgment of the Seventh Circuit in their case.

OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing en banc (App., *infra*, 1a) is unreported. The opinion of the court of appeals on petition for review (App., *infra*, 2a-11a) is reported at 188 Fed.Appx. 510. The final order of the Board of Immigration Appeals (App., *infra*, 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2006. Petitioners' timely petition for rehearing was denied on November 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 243(b)(3)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1231(b)(3)(A) provides a restriction on removal of an alien to a country where the alien's life or freedom may be threatened — Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social

group, or political opinion.

Section 1208.16(b)(2) of the Code of Federal Regulations provides in part—

> In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular group, or political opinion, the immigration judge shall *not* require the applicant to provide evidence that he or she would be singled out individually for such persecution if:
>
> (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country. *Id.*

STATEMENT

This case presents the important and recurring question of whether an Indonesian woman and an asylum[1] applicant

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[1] An asylum applicant is also considered to be an applicant for withholding of removal under INA, §241(b)(3), 8 U.S.C. §1231(b)(3). See 8 C.F.R. §1208.1(a)— "Unless otherwise provided in this chapter, this subpart shall apply to all applications for asylum under section 208 of the Act or ... for withholding of removal under section 241(b)(3) of

of Chinese ethnicity and Christian faith who has demonstrated membership in a "disfavored group" (as this term was first formulated by J. Reinhardt in *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994) and expressly embraced by the Fourth and Eighth circuits[2]) will not be found to have shown a well founded fear of persecution unless she can also demonstrate that she has been "singled out individually" for persecution.

Kotasz involved a petition for review by a husband and wife and their two children whom are natives and citizens of Hungary. Husband Mihaly Kotasz applied for asylum based on having been arrested and beaten on several occasions by the Hungarian police because of his active opposition to the Hungarian communist government. His wife Agnes Kotasz also applied for asylum based on her ethnic status as a gypsy. 31 F.3d 849.

Although the BIA did not question the reliability of the evidence presented by Mihaly (showing that he had been

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(Cont' from prior foot note) the Act... whether before an asylum officer or an immigration judge, regardless of the date of filing." *Id.*

[2] See *Chen v. INS*, 195 F.3d 198 (4th Cir. 1999) ("[T]he more egregious the showing of group persecution ... the less evidence of individualized persecution must be adduced") *Id* at 204; see also *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995)—

> In such cases, although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership *(Cont' from prior foot note)* nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole. *Id* at 1383.

arrested and beaten on several occasions by the Hungarian Police because of his active opposition to the communist party), it denied Mihaly's asylum request based on the fact that Mihaly was arrested "along with numerous other demonstrators," and thus, in its view, he was not "singled out" for persecution.

J. Reinhardt pointed that the requirement of showing that the applicant faces a particularized threat of persecution (i.e., that the alien will be "singled out" for persecution) is encompassed within the well-founded fear standard. 31 F.3d 852 –

> ("Although we have expressed this requirement using various formulations, the underlying ideas has remained constant: the petitioner cannot simply prove that there exists a generalized or random possibility of persecution in his native country; he must show that he is at particular risk- that his 'predicament is appreciably different from the dangers faced by [his] fellow citizens' (internal quotations omitted)."

Acknowledging that most of the cases cited in the opinion on this point involved citizens of El Salvador, the *Kotasz*'s opinion stated—

> "In the Salvadorian cases, we ruled in favor of the petitioner only when he showed that for one reason or another he was subject to particular danger" citing *Zavala-Bonilla v. INS*, 730 F.2d 562, 564-67 (9th Cir. 1984); *Aviles-Torres*, 790 F.2d at 1435 and *Canjura-Flores v. INS* 784 F.2d 885, 888 (9th Cir. 1985). *Id.*

The opinion remarked that the court's underlying approach requiring the individualized showing was based in the determination that, despite the widespread political violence that existed in El Salvador during the same period, neither all Salvadorians nor all rebel sympathizers were systematically persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. In contrast, the opinion noted, there are more extreme situations in which members of an entire group-though perhaps not of an entire nation- *are* systematically persecuted.

> In such cases, group membership itself subjects the alien to a reasonable possibility of persecution, so that he or she will be able to satisfy the objective component of the well-founded fear standard simply by proving membership in the targeted group. *Kotasz* at 852.

Thus, the *Kotasz* import is its explicatory formula that, where the claim of persecution is based on a non-pattern or practice showing of group persecution "*the more egregious the showing of group persecution-the greater the risk to all members of the group-the less evidence of individualized persecution must be adduced.*" *Kotasz* at 31 F.2d 853.

To illustrate the point, *Kotasz* noted the example that where a Christian sect is targeted, priests may be more at risk than ordinary church members; where a union is targeted, union leaders may be more at risk than ordinary union members (internal citations omitted). "The main point, at any rate, is that the categories of group targeting and individual targeting are not absolute and distinct, and in most cases, they co-exist". *Id* at 854.

Using analogies, J. Reinhardt commented—

> "[A]s the systematic attempt to annihilate the Jews in Nazi Germany conclusively demonstrates, persecution of an entire group can render proof of individual targeting entirely superfluous. Certainly, it would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution. Similarly, it would be unnecessary for members of other systematically persecuted groups to show that they have been selected on an individual basis as subject of persecution." *Kotasz* at 31 F.2d 852.

The same concern was raised by J. Posner in *Sahi v. Gonzales,* 416 F.3d 587 (7th Cir. 2005) a case arising from the same circuit having jurisdiction over the present petition, remarking that dicta from cases cited therein could not be correct because they imply — "[t]hat a German Jew who sought asylum during the Hitler era would have had to show that he would be treated even worse than other German Jews if he were returned to Germany"[3]. 416 F.3d 590.

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[3] J. Posner went on to state:

> Suppose most members of some group are persecuted, but others are not-maybe they have relatives among the persecutors, or unique skills, or great wealth, and so obtain a special dispensation. (The Nazis spared some Jews because they were married to Gentiles.) It would not follow that a member of the group who sought asylum would have to prove that ***he*** was not one of the favored ones, especially if the favored were only a small percentage of the group (citing, *Lolong v. Gonzales,* 400 F.3d 1215, 1219-20 (9th Cir.2005) (pending en banc rehearing on same and other issue).

A relatively large number of cases in recent years have involved Christian asylum seekers from Indonesia--most of whom are of ethnic Chinese ancestry and are women. In several of these cases involving Christian asylum seekers, courts have found the treatment of Christians in Indonesia to rise to the level of persecution. See, *Eduard v. Ashcroft*, 379 F. 3d 182, 192 (5th Cir. 2004) (asylum granted to two Christians from Indonesia who were unable to prove past persecution but demonstrated a well-founded fear of future persecution because there is a "pattern of persecution of Christians in Indonesia"); *Lolong v. Gonzales*, 400 F. 3d 1215 (9th Cir. 2005) (Christian women particularly targeted and at risk of being raped and abused; Indonesian government unwilling or unable to control the forces behind religious persecution); *Sael v. Ashcroft*, 386 F. 3d 922 (9th Cir. 2004) (documenting long history of persecution of ethnic Chinese-Indonesians).

On the other hand, other courts have found the opposite with respect to the *same* treatment of other women Christian asylum seekers from Indonesia. See Third Circuit in *Lie v. Ash*croft, 396 F.3d 530, 537 (3d. Cir.2005) ("[w]e agree with the BIA, that Lie has failed to establish ... there is a "pattern or practice" of persecution of Chinese Christians in Indonesia."). *Id* at 537. See also *Timbuleng v. Attorney General of U.S.*, 173 Fed.Appx. 973 ("...there was no a pattern or practice of persecution of Christians in Indonesia.")

A. Factual Background

Sanusi is a native and citizen of Indonesia, a woman, of ethnic Chinese ancestry and a practicing Catholic. Sanusi's claim of persecution is based in part, on ethnically and religiously motivated sexual abuse she suffered in Indonesia from a very young age. Sanusi testified that

when she was seven or eight years old she was touched inappropriately by one of two men who accosted her and her aunt on a bus and demanded money at knife point. That time, she said, the assailants referred to her aunt as "Chinese." She also testified that a few years later, when she was 11, an individual (whom she did not describe) called her "Chinese" and tried to kiss her and touched her breast.

The most serious attack, though, occurred when Sanusi was in junior high; she was sexually assaulted (raped) in front of her mother while the two were walking near the family home. While she was being assaulted by one man in the presence of her mother, another man was preventing her mother from interfering with the ongoing sexual abuse. Sanusi attributed this most serious and the other sexual abuse occurrences of lesser degree on her ethnic Chinese characteristics.

Sanusi's claim is also based on her having lost the family home after Muslim mobs incinerated it during the riots in May of 1998, for the same reasons of her family's Chinese ethnic and Catholic religious characteristics. Sanusi presented evidence to the immigration judge showing that ethnic Chinese Catholics like her, and especially women, were systematically being targeted for abuse by Muslims in Indonesia. On these grounds, Sanusi requested withholding of removal to Indonesia.

B. Proceedings Below

The Immigration Judge ("IJ") denied withholding of removal and granted voluntary departure within 60 days with an alternate order of removal to Indonesia. According to the IJ, Sanusi had not demonstrated a clear probability of future persecution. The IJ found that "[T]here is support in

these reports for the respondent's [Sanusi's] position that ethic Chinese have suffered discrimination from non-ethnic Indonesians and from the government, that is, the government does not protect them in that some Indonesian extremist have abused them". Ultimately, the IJ found that there was no widespread persecution of ethnic Chinese in Indonesia noting that the key point is on "widespread" and that the answer to that question is "no".

On appeal, the BIA adopted the decision of the IJ so that on petition for review the court of appeals would review the IJ's order only and not that of the BIA. *See, Ali v. Ashcroft*, 395 F.3d 722, 727 (7th Cir. 2005).

The Seventh Circuit denied review holding that the evidence does not compel the court to conclude that Sanusi was eligible for withholding of removal. The Seventh Circuit remarked that the IJ had not focus on whether the attacks against the petitioners were on account of their ethnicity or religion. Rather, the IJ thought that the evidence suggested "a problem of Islamic extremism" in Indonesia, and also concluded from the record that the government was attempting to correct the problem. The court of appeals noted that the petitioners did not provide compelling evidence that the government of Indonesia was complicit or indifferent to their suffering.

Pointing to the State Department's country reports from Indonesia, the Sanusi panel noted that the IJ had recognized the complex history of discrimination against ethnic Chinese and Catholics but that he had found no evidence of widespread persecution against either. The panel stated that "We recently considered the conditions Chinese-Catholic Indonesians face, and rejected a petitioner's challenge to a denial of withholding of removal, concluding that the Indonesian government has taken steps to 'control

the ethnic and religious tension'". *Firmansjah v. Gonzales*, 424 F.3d 598, 607 (7th Cir. 2005). The panel then went on to state that "except for the Ninth Circuit, other circuits generally agree that the Indonesian government has worked to protect members of this group (citing *Susanto v. Gonzales*, 439 F.3d 57, 61 (1st Cir. 2006); *Wijono v. Gonzales*, 439 F.3d 868, 874 (8th Cir. 2006); *Setiadi v. Gonzales*, 439 F.3d 710, 714 (8th Cir. 2006); *Lie v. Ashcroft*, 396 F.3d 530, 537 (3rd Cir. 2005)).

A different result was reached by the Third Circuit in a virtually identical case brought by another alien where the government petitioned for remand to the BIA to consider whether "there is a pattern or practice of persecution of ethnic Chinese in Indonesia" where at the request of the petitioners in that case, the IJ should also consider changes in the conditions in Indonesia. *See, In Re Lucas Suseno-Hadi, Lukman Like Chandra*, 2006 WL 3922181 (BIA) (*App.* 14a).

The IJ also found "scant evidence" that the petitioners, even assuming their testimony was credible, had suffered persecution while living in Indonesia. Although the IJ characterized the destruction of Sanusi's parents' home as "an event of some significance," he reasoned that the petitioners could not attribute the 1998 rioting to the government even though there was some indication that the government didn't take "effective action" to control the turmoil. The IJ then concluded that "[t]he history in Indonesia does not indicate that there is generalized mistreatment of Chinese or Catholics by the government or by a part of Indonesian society that the government will not control or is unwilling to control." The IJ recognized that reports on country conditions in Indonesia do evidence discrimination against ethnic Chinese—sometimes by the government—and opined that the government had "not

done enough to protect its ethnic and religious minorities."

The IJ also acknowledged recent, isolated attacks by extremists targeting ethnic Chinese and Christians in areas of Indonesia remote from Jakarta. But the IJ found "no indication that the government follows a persecutory policy toward Chinese or Catholic[s]," and concluded that the petitioners had not demonstrated widespread persecution of either ethnic Chinese or Catholics in Indonesia.

REASONS FOR GRANTING THIS PETITION

A. *The Federal Courts Of Appeals Are Irreconcilably Split Over The Issue Of Whether A Showing Of Membership In A "Disfavored Group" Still Requires An Applicant To Show Actual Individualized Persecution To Establish Eligibility For Withholding Of Removal.*

After it was first enunciated in *Kotasz v. INS, supra*, the descriptive term of "disfavored group" in the context of asylum and withholding law, was explicitly embraced by the Fourth Circuit in *Chen v. INS, supra* and by the Eight Circuit in *Makonnen v. INS*, supra.

The court in *Chen* involved an alien from the Republic of China who maintained that he was entitled to refugee status because of his well founded fear of persecution based on China's "one child" population control program, of being subjected to an involuntary sterilization procedure or of being persecuted for a refusal to undergo such procedure. The *Chen* court remarked—

> "[T]he more egregious the showing of group persecution ... the less evidence of individualized

> persecution must be adduced." *Kotasz*, 31 F.3d at 853. Conversely, a stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is membership in a diffuse class against whom actual persecution is haphazard and rare. *Chen* at 204.

The Eight Circuit in *Makonnen v. INS*, *supra*, found that the BIA had applied an erroneous standard in denying asylum to an Ethiopian national of Oromo descent who, along with her family, was affiliated with the Oromo Liberation Front during the 1980's and 1990's. The BIA had concluded that because Makonnen did not produce sufficient evidence of a "pattern and practice" of persecution against *all* the Oromo people by the Mengistu regime in Ethiopia, she was required to prove that she would be (or would have been) singled out for persecution.

The Eighth Circuit rejected the BIA's reasoning stating—

> "In such cases, although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole") *Id* at 1383.

See also *Feleke v. I.N.S.*, 118 F.3d 594 (8th Cir. 1997) (same); *Agada v. Ashcroft*, 368 F.3d 867 (8th Cir. 2004)

(We have defined a pattern or practice of persecution as requiring "organized or systematic or pervasive persecution." *Makonnen*, 44 F.3d at 1383.)

The Third and the Seventh Circuits have refused to adopt the *Kotasz* principle of "disfavored group" in the context of asylum law within their respective circuits.

For example, the Third Circuit in *Lie v. Ashcroft*, 396 F.3d 530 (3rd Cir. 2005) stated that "We disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a "pattern or practice" of persecution and, similarly, we reject the establishment of a "disfavored group" category." Id, at 538 fn 4.

Also the Seventh Circuit in *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005) has clearly stated its refusal to adopt a lower standard of proof for purposes of establishing eligibility for asylum and withholding relief— This circuit has not recognized a lower threshold of proof based on membership in a "disfavored group" citing Cf. *Lie*, 396 F.3d at 538 n. 4). *Id* at 607, fn 6.

B. *Review Is Also Warranted Because With Respect To Specific Indonesian Asylum And Withholding Claims From Indonesia, The Federal Courts Of Appeals Are Split Over The Issue Of Whether There Is A Pattern Or Practice Of Persecution Of Ethnic Chinese And Other Religious Minorities In Indonesia.*

For example, the Fifth Circuit in *Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir. 2004) held— It is clear from the record, and the IJ's findings, that there was a pattern of persecution of Christians in Indonesia. Thus, Petitioners were not required to show that they would be singled out for persecution upon return to Indonesia. *Id.*

This finding was based on the country conditions in Indonesia during 2000, which stated in part, as follows—

> The United States State Department has reported that in Indonesia there were "122 religiously motivated attacks on Christian churches and other Christian facilities during 2000.... These attacks resulted in 3,000 deaths, the displacement of nearly 500,000 people, and damage to at least 81 churches and dozens of mosques." Pakkung claimed that "[k]illings, bloodshed, burnings, persecutions of Christians are happening all over Indonesia in places like Jakarta, Bandung, Solo, Situbondo, Surabaya, Lombok, Bali, West Kalimantan, Ujung Pandang, Poso, Maluku Island and even in Irian Jaya." Gideon Tandirerung confirmed that Christians are pressured to convert to Islam and churches are routinely burned. Gideon Tandirerung testified that the Laskar Jihad is widely influential throughout Indonesia. He specified that the Laskar Jihad, in its efforts to convert Christians to Islam, routinely burns churches and commits physical acts of violence against Christians. *Id* at 192, fn 10.

Similarly, the court of appeals in *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004) held that—

> Asylum applicant demonstrates well-founded fear of future persecution by establishing pattern or practice of persecution of people similarly situated or by proving that she is member of "disfavored group" coupled with showing that she, in particular, is likely to be targeted as member of

> that group; the more serious and widespread the threat to the group in general, the less individualized the threat of persecution needs to be. *Id* at 922.

In reaching this decision, the panel in *Sael* referenced the voluminous record documenting a history of anti-Chinese violence dating as far back as 1740 during the Dutch colonial rule[4]. It noted that anti-Chinese attacks continued after Indonesia achieved its independence; in the 1960s, the ethnic Chinese minority was targeted in what one news account describes as "near genocidal" anti-communist pogroms[5]. Moreover, according to Human Rights Watch, anti-Chinese violence accompanied "virtually every outbreak of social and political unrest during President Soeharto's thirty years in power."[6]

Turning to modern times such as the anti-Chinese violence that peaked in 1998 and specifically noted – more than 1,000 people were killed and dozens of women raped during a series of bloody riots.[7] In the years since the 1998

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[4] *Terror in Chinatown: The Ethnic Chinese in Indonesia Continue to Live in Fear*, The Economist, Aug. 22, 1998, at 31("Indonesia's Chinese are used to mob violence. As long ago as 1740, Chinese immigrants in Jakarta were attacked by a combination of hostile indigenous people and suspicious Dutch administrators.").

[5] *Indonesia: Why Ethnic Chinese Are Afraid*, BBC News, March 3, 1998, at http://news.bbc.co.uk/1/hi/world/analysis/51981.stm.

[6] Human Rights Watch, *Indonesia Alert: Economic Crisis Leads to Scapegoating of Ethnic Chinese* (Feb.1998) *at* http://www.hrw.org/press98/feb/indo-al2.htm.

[7] Bureau of Democracy, Human Rights, and Labor, United States Dep't of State, Indonesia Country Report on Human Rights Practices for 1998 (Feb. 26, 1999) (citing evidence of rapes and stating that the ethnic Chinese minority "was not protected by the authorities" during the 1998 riots); Human Rights Watch, World Report 1999: Indonesia and East Timor, *at* http://www.hrw.org/worldreport99/asia/indonesia.html.

riots, the international news media has documented continued tensions, resentment and violence. In at least one instance, ethnic Chinese found their homes marked for destruction, much as they had been before the 1998 violence. *See Bali's Ethnic Chinese Living in State of Fear,* The Jakarta Post, Feb. 6, 2000. Chinese Christian churches and homes have also been attacked in a violent merger of religious and ethnic tensions. *See, e.g.,* Julie Schmit, *Indonesian Violence Spreads, As Does Fear,* USA Today, Jan. 20, 2000, at 8A; *see also* Bureau of Democracy, Human Rights, and Labor, United States Dep't of State, 1999 Country Reports on Human Rights Practices: Indonesia § 5 (Feb. 25, 2000) (documenting attacks on Christian churches, and explaining that while attacks on churches "clearly reflect religious tensions," other "contributing factors" include "underlying socioeconomic and political tensions between poor Muslims and relatively more affluent ethnic Chinese Christians"). *Sael* at 926.

Other courts have taken the opposite position with regards to this issue relying on evidence that the government is trying to control its Muslim majority by building religious and ethnic tolerance and noting that the government has taken action to prosecute those involved in the 1998 rioting. See for example, the Third Circuit in *Timbuleng v. Attorney General of U.S.*, 173 Fed.Appx. 973 ("...there was no a pattern or practice of persecution of Christians in Indonesia."). See also, the Third Circuit in *Lie v. Ashcroft, supra*—

> Petitioners argue, with some force, that anti-Chinese violence persists, citing evidence in the record of widespread attacks on Chinese Christians in Indonesia, including press accounts of riots, vandalism, and robbery targeting Chinese Christians. Nevertheless, such violence does not

> appear to be sufficiently widespread as to constitute a pattern or practice. The 1999 Country Report on Indonesia indicated that there was a sharp decline in violence against Chinese Christians following the period of intense violence in 1998, and noted that the Indonesian government officially promotes religious and ethnic tolerance. Moreover, this violence seems to have been primarily wrought by fellow citizens and not the result of governmental action or acquiescence. Given these considerations, we are not compelled to find that such attacks constitute a pattern or practice of persecution against Chinese Christians.) *Id,* at 537-538.

C. *The Issue Presented Is Of National Importance*

There is no simpler way to avoid the realization that had Sanusi's application for withholding been presented to an IJ whose immigration court is under the jurisdiction of the Fourth, Eighth or Ninth Circuit court of appeals, she would have received a different outcome on her case.

The law over the issue presented here is of national importance because it affects hundreds and possibly thousands of asylum and withholding of removal seekers who stand in the same or similar position as the Sanusis. The issue is unsettled between the circuits, where as demonstrated, despite the fact that the grounds for seeking asylum and withholding are significantly identical (i.e., ethnic Chinese of Catholic or Christian belief in Indonesia) some circuits apply the "disfavored group" approach for non-pattern or practice group persecution while others explicitly reject it. For these reasons, this petition warrants the court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Court ORDER denying Rehearing 1a
The U.S. Court of Appeals for the Seventh Circuit denying Petitioners' petition for rehearing en banc, dated November 3, 2006.

Court ORDER denying review 2a-11a
The U.S. Court of Appeals for the Seventh Circuit denying Petitioners' petition for review, dated July 24, 2006.

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Final Administrative Order of the BIA dated June 21, 2005.

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Per curiam order of the BIA remanding case to Immigration Judge to determine inter alia, whether there is a pattern or practice of persecution of ethnic Chinese in Indonesia, dated December 19, 2006.

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United States Court of Appeals

For the Seventh Circuit Chicago, Illinois 60604

Novembers, 2006

Before

Hon. Richard D. Cudahy, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

KRISTANTY SANUSI, et al.,	)	Petition for Review of
Petitioner,	)	an Order of the Board
	)	of Immigration Appeals
v.	)	No. 05-3100
	)	Nos. A96-496-600,
ALBERTO GONZALES,	)	A96-496-601 &
ATTORNEY GENERAL,	)	A96-496-602
Respondent.	)	

ORDER

On consideration of the petition of Petitioners for rehearing with suggestion for rehearing *en bane* filed October 10, 2006, in the above-captioned case, all of the judges on the panel voted to deny a rehearing, and no other member of the court has voted for rehearing *en bane.*

Therefore, the petition for rehearing with suggestion for rehearing *en bane* is DENIED.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued *May* 9, 2006
Decided July 24, 2006

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge* No. 05-3100

Petition for Review of an Order of the
Board of Immigration Appeals

Nos. A96-496-600, A96-496-601 & A96-496-602

KRISTANTY SANUSI, et al. *Petitioners,*

v.

ALBERTO GONZALES, *Respondent.*

ORDER

The petitioners, a husband and wife and their minor son, applied for asylum and withholding of removal on grounds of ethnic and religious persecution in their native Indonesia. The petitioners did not timely seek asylum, and the IJ and the BIA agreed that they were ineligible for

withholding because they had not demonstrated a clear probability of persecution should they return to Indonesia. The petitioners challenge the denial of withholding of removal, but that decision is supported by substantial evidence.

Kristanty Sanusi, the primary applicant, and her husband, Djoni Susanto Lie, are ethnically Chinese and practicing Catholics. They and son Steven, who is now seven years old, entered the United States most recently in May 2000 at Los Angeles, California, and overstayed their six-month visitor visas. The couple also have a daughter,

whose birth shortly after their arrival in the United States is not relevant to this case. In March 2003, almost three years after they arrived, the petitioners applied—as relevant here—for withholding of removal, claiming past persecution on account of their ethnicity and religion. Two months later DHS initiated removal proceedings and served the petitioners with Notices to Appear.

Sanusi and Lie were the only witnesses before the IJ. Sanusi, who is presently 33 years old, was educated in Catholic primary and secondary schools in her Jakarta neighborhood and graduated from college with a degree in accounting. Afterward she helped her father run his successful stationery store. Her parents, two brothers, and one of her sisters still live in Jakarta.

Sanusi's contention that she suffered ethnically or religiously motivated abuse really comes down to events during a few days in 1998 and 2000. In May 1998, according to Sanusi, students who were protesting economic conditions and the waning rule of then-president Haji Mohammad Suharto rioted in Jakarta and looted Chinese businesses. The government, she said, offered no protection, and during the riots her family home was burned and several of her neighbors were beaten. One year later, Sanusi continued, she left for an extended visit to the United States with Lie, but the couple returned voluntarily to Jakarta in August 1999 when her parents assured them that the situation in Indonesia had improved. During 2000, though, she twice encountered rock-throwing mobs. The first time, in January, she was attending Mass with other Chinese Catholics when people outside yelling "Allah Akbar" (a common Arabic expression meaning Allah is the Greatest) began pelting the

church with stones. She did not make any effort to call the police and was unaware if any of the other parishioners had either. Then in mid-May, during the anniversary of the 1998 riots, protestors shouting "kill the Chinese" tried unsuccessfully to enter the temporary housing where her family had moved after losing their house. Nobody was injured in either attack, and neither the church nor the shelter was damaged.

Apart from these events, Sanusi focused on sexual abuse she suffered as a child. She testified that when she was seven or eight she was touched inappropriately by one of two men who accosted her and her aunt on a bus and demanded money at knife point. That time, she said, the assailants referred to her aunt as "Chinese." She also testified that a few years later, when she was 11, an individual (whom she did not describe) called her "Chinese" and tried to kiss her and touched her breast. Sanusi's testimony about this incident might be read to suggest that her assailant and his companions touched her more than once ("[q]uite often, when I passed by, they would look at me and then they would touch my breast"), but her counsel characterizes it as a single episode. The most serious attack, though, occurred when Sanusi was in junior high; she was sexually assaulted in front of her mother while the two were walking near the family home.

As before she did not describe the assailant, and this time neither did she attempt to ascribe any ethnic or religious motive to the attack.

Lie's testimony was shorter. He corroborated Sanusi's testimony about the attacks on the church and her family's temporary housing, but otherwise he had little to add about his own personal experiences. Mostly he implied that Indonesian authorities are indifferent to attacks on ethnic-Chinese. He testified that police did nothing when his uncle was murdered after he and Sanusi came to the United States; that testimony was false: a newspaper article introduced by the petitioners recounts that police had charged employees of the uncle with committing the murder during a robbery. Lie also testified that his brother had been robbed and beaten by people calling him "Chinese Bastard," and that his brother told him he saw an Indonesian marine fire a gun into a car occupied by an ethnic-Chinese family.

The IJ held that the petitioners were ineligible for withholding of removal because they had not demonstrated a clear probability of future persecution. Looking first to past events, the IJ found "scant evidence" that the petitioners, even assuming their testimony was credible, had suffered persecution while living in Indonesia. The IJ, while characterizing the destruction of Sanusi's parents' home as "an event of some significance," reasoned that the petitioners could not attribute the 1998 rioting to the government even though there was some indication that the government didn't take "effective action" to control the turmoil. Moreover, the IJ concluded that the two stone-throwing incidents in 2000 were "not really significant events" and, again, not attributable to the government.

As to whether the petitioners might reasonably fear future persecution apart from their past experiences, the IJ observed that their return to Indonesia in 1999 undermined any argument that events before that year were cause for them to fear the prospect of future abuse. The IJ then concluded that "[t]he history in Indonesia does not indicate that there is generalized mistreatment of Chinese or Catholics by the government or by a part of Indonesian society that the government will not control or is unwilling to control." The IJ recognized that reports on country conditions in Indonesia do evidence discrimination against ethnic Chinese—sometimes by the government—and opined that the government had "not done enough to protect its ethnic and religious minorities." The IJ also acknowledged recent, isolated attacks by extremists targeting ethnic Chinese and Christians in areas of Indonesia remote from Jakarta. But the IJ found "no indication that the government follows a persecutory policy toward Chinese or Catholic[s]," and concluded that the petitioners had not demonstrated widespread persecution of either ethnic Chinese or Catholics in Indonesia.

The petitioners argue that substantial evidence does not support the IJ's and BIA's conclusion that they failed to establish past persecution. The BIA adopted the IJ's decision, so we review the IJ's order. *See Ali v. Ashcroft*, 395 F.3d 722, 727 (7th Cir. 2005). To have qualified for withholding of removal, the petitioners were required to show that it is more likely than not that their "life or freedom would be threatened" upon return to Indonesia on account of their "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *Lhanzom*, 430 F.3d at 842. This standard is stricter than the standard for establishing asylum eligibility, *Prela v. Ashcroft*, 394 F.3d 515, 519 (7th Cir. 2005), and the IJ found that the petitioners would not have qualified for asylum even if their application had been timely. We review a denial of an application for withholding of removal for substantial evidence, and will grant a petition for review only if the petitioners' evidence compels relief. *Mabasa v. Gonzales*, 440 F.3d 902, 907 (7th Cir. 2006).

The petitioners' evidence does not compel us to conclude that they were eligible for withholding of removal. Sanusi claimed she had been sexually assaulted on three occasions in her youth, although she alleged only stray remarks to show that the attacks were motivated by her ethnicity. She also testified that her parents' home was burned by student rioters in 1998, and that she and her husband were victims of two separate rock attacks in 2000. The IJ did not focus on whether the attacks against the petitioners were on account of their ethnicity or religion. Instead the IJ concluded that there was no link to the government. The IJ thought that the evidence suggested "a problem of Islamic extremism" in Indonesia, but he also

concluded from the record that the government was attempting to correct the problem. Persecution is something perpetrated by the government or by a nongovernmental group that the government refuses to control, *Margos v. Gonzales*, 443 F.3d 593, 599 (7th Cir. 2006); *Hor v. Gonzales*, 421 F.3d 497, 501-02 (7th Cir. 2005); *Mitreva v. Gonzales*, 417 F.3d 761, 764-66 (7th Cir. 2005), and the petitioners have not provided compelling evidence that the government of Indonesia was complicit or indifferent to their suffering.

Moreover, the IJ considered the State Department's country reports and recognized the complex history of discrimination against ethnic Chinese and Catholics in Indonesia, but found no evidence of widespread persecution against either. We recently considered the conditions Chinese-Catholic Indonesians face, and rejected a petitioner's challenge to a denial of withholding of removal, concluding that the Indonesian government has taken steps to "control the ethnic and religious tension." *Firmansjah v. Gonzales*, 424 F.3d 598, 607 (7th Cir. 2005). And except for the Ninth Circuit, other circuits generally agree that the Indonesian government has worked to protect members of this group. *See Susanto v. Gonzales*, 439 F.3d 57, 61 (1st Cir. 2006); *Wijono v. Gonzales*, 439 F.3d 868, 874 (8th Cir.

2006); *Setiadi v. Gonzales*, 437 F.3d 710, 714 (8th Cir. 2006); *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005). *But see Lolong v. Gonzales*, 400 F.3d 1215, 1220-22 (9th Cir. 2005); *Sael v. Ashcroft*, 386 F.3d 922, 925-27 (9th Cir. 2004). That Sanusi's family has remained in Indonesia and continues to attend the same church in Jakarta further belies the petitioners' claim that they fear future persecution. *Firmansjah*, 424 F.3d at 607.

Accordingly, there is substantial evidence to support the IJ's withholding decision. In a final attempt to undermine that conclusion, the petitioners contend that the IJ denied them of a full and fair hearing by disregarding "relevant" testimony because it was too remote in time. We review *de novo* the purely legal question of whether an immigration hearing violated due process. *Giday v. Gonzales*, 434 F.3d 543, 547 (7th Cir. 2006). The Fifth Amendment Due Process Clause requires that aliens be afforded a meaningful opportunity to be heard and a reasonable opportunity to present evidence during deportation proceedings. *See id.* This standard ensures petitioners a full and fair opportunity to present their case without frequent interruptions or hostility from the IJ. *Id.* at 548. Here, though, the petitioners contend only that the IJ improperly disregarded certain events. They do not suggest that the IJ overreached his role as arbitrator to control testimony or that he improperly barred complete chunks of oral testimony that would have supported their claims. Instead the IJ allowed the record to develop during the proceedings, and only afterwards did he decide to assign no weight to events he considered too remote to bear on the issue of persecution. The IJ's weighing of evidence after the petitioners were afforded a meaningful opportunity to be heard, did not

violate their right to due process. *See Liu v. Ashcroft*, 380 F.3d 307, 315 (7th Cir. 2004); *Kerciku v. INS*, 314 F.3d 913, 917-18 (7th Cir. 2003). The petition is DENIED.

U.S. **Department of Justice** Executive Office for Immigration Review

Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Date: JUN 21, 2005

File: A96-496-601 - Chicago

In re: LIE, DJONI SUSANTO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dixon Wong

ON BEHALF OF DHS: John Gountanis, Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent failed to file for asylum within the requisite statutory period. We are in agreement with the decision of the Immigration Judge not to consider the respondent's request for asylum on that basis. However, we have considered the applications for withholding of removal and relief pursuant to the Convention Against Torture. Even assuming his credibility, the respondent failed to meet the burden of proof to establish a likelihood of persecution on account of a ground protected by the Act. Likewise, the respondent failed to establish that there was a likelihood of being subjected to torture upon return to the respondent's country of citizenship. Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249"«£the Immigration and Nationality Act. *See* section 240B(d) of the Act.

2006 WL 3922181 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice

Executive Office for Immigration Review Board of Immigration Appeals

IN RE: LUCAS SUSENO-HADI LUKMAN SETYADI LIKE CHANDRA
FILES: A76 141 812 - NEWARK
A76 141 810
A76 141 817

December 19, 2006

IN REMOVAL PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENTS: Donald F. Madeo, Esquire

APPLICATION: Asylum; withholding of removal; Convention

Against Torture ORDER:

PER CURIAM. On September 6, 2005, the Board affirmed the Immigration Judge's March 22, 2004, decision. The respondents filed petitions for review in the United States Court of Appeals for the Third Circuit. Thereafter, the government filed an unopposed motion to remand the case to the Board for additional consideration of the adverse credibility determination entered for respondent Lucas Suseno-Hadi and to consider whether "there is a pattern or practice of persecution of ethnic Chinese in Indonesia" with respect to all three claims. In their brief on remand from the Third Court, the respondents request that these cases be returned to the Immigration Judge for further proceedings to include consideration of changes in conditions in Indonesia. The government did not file a brief in response to the October 26, 2006, briefing schedule. Given the government's action and the respondent's request, we will remand the record to the Immigration Judge to further consider the respondents' applications for relief from removal in accordance with the May 9, 2006, order of the court. In addition, the parties should be provided the opportunity to present any additional relevant evidence. Accordingly, the record is remanded to the Immigration Judge for further proceedings and for entry of a new decision.

<Signature> FOR THE BOARD

2006 WL 3922181 (BIA) END OF DOCUMENT

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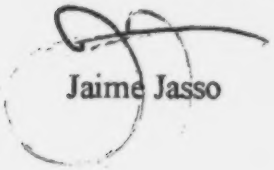
Corporate Statement
Supreme Court Rule 29.6

The undersigned counsel for the petitioners states that a prior corporate disclosure statement was submitted and is included in the petition for review filed with the court of appeals and forms part of the judicial record in this case in docket number 05-3100.



Jaime Jasso